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DEC 20 2001

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERKUNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE McCARTY COMPANY, INC.,

NO. CIV. S-01-158 LKK/JFM

Plaintiff,

v.

O R D E R

UNITED STATES OF AMERICA,

Defendant.
_____/

Plaintiff brings this action against the United States to challenge the Notice of Determination of the Internal Revenue Service's Appeals Office pursuant to 26 U.S.C. §§ 6320 & 6330. This matter is before the court on defendant's motion for summary judgment, the standard for which is well-known and need not be repeated here. See Rodgers v. County of Yolo, 889 F. Supp. 1284 (E.D. Cal. 1995).

The court reviews IRS determinations from collection due process hearings for abuse of discretion where the amount of tax liability was not in dispute at the hearing. TKK Management v.

1 United States, 2000 WL 33122706 (C.D. Cal. 2000) (citing H. Conf.
2 Rept. No. 105-599, at 266 (1998)). While plaintiff now challenges
3 the amount of penalties and interest assessed, it did not do so at
4 the hearing. See 26 U.S.C. § 6330(b)(3). Accordingly, the court
5 reviews the decision of the appeals officer for abuse of
6 discretion.

7 Plaintiff owes the IRS more than \$2,000,000 in back taxes,
8 including penalties and interest.¹ As a result, the IRS filed both
9 a federal tax lien and a levy notice against plaintiff's assets.
10 At the collection "due process" hearing, the appeals officer agreed
11 to withdraw the tax lien on the condition that plaintiff enter into
12 an agreement to pay, secured by an irrevocable letter of credit or
13 a bond, and to stay current with tax deposits for the year 2000.
14 Plaintiff failed to satisfy these conditions. Thus, the appeals
15 officer concluded that the recorded lien was necessary to protect
16 the government's interest in collecting plaintiff's outstanding
17 taxes.

18 ////

19 _____
20 ¹ Plaintiff failed to pay its back taxes even after repeated
21 warnings by the IRS. At the time of the hearing, plaintiff was
22 late with every payment of its Form 943 taxes since 1994.
23 Plaintiff made no deposits of its Form 941 taxes for the four
quarters of 1998, the four quarters of 1999, and the two quarters
in 2000 that were due at the time of the hearing. See Complaint,
Exh. F at attached Exh. A.

24 While plaintiff made timely deposits of its Form 940 taxes in
25 1997, it failed to make such tax payments for 1998. As a result,
between 1994 and 1999, plaintiff was assessed penalties totaling
26 almost \$500,000 for not making tax deposits, and an additional
\$500,000 in interest and late payment penalties. See Complaint,
Exh. F at attached Exh. A.

1 Plaintiff argues that the appeals officer's determination was
2 an abuse of discretion because he failed to consider the company's
3 hardship before imposing the lien. I cannot agree.

4 Under the tax code, an appeals officer must consider the need
5 for the efficient collection of taxes with the legitimate concern
6 of the taxpayer, and ensure that the action is no more intrusive
7 than necessary. See 26 U.S.C. § 6330(c)(3). At the hearing,
8 plaintiff requested that the lien be withdrawn, arguing that Wells
9 Fargo had prior rights and could foreclose on plaintiff's loans
10 resulting in the foreclosing on the company's assets and closure
11 of its business. See Complaint, Exh. F, at 4. In response the
12 appeals officer agreed to withdraw the tax lien if plaintiff
13 satisfied the conditions explicated above. While hardly a generous
14 offer, there was an effort on the appeals officer's part to permit
15 the company to remain viable while protecting the government's
16 interests. When plaintiff was unable to meet the conditions, the
17 appeals officer concluded that the lien was necessary in light of
18 the company's continuing history of "procrastination and broken
19 commitments" and its continual accrual of taxes. See Complaint,
20 Exh. F, at 7. The court concludes that the appeals officer acted
21 within his discretion to prevent the future accrual of taxes, even
22 if the decision ultimately results in the IRS recovering none of
23 plaintiff's assets. It seems clear to the court that the IRS is
24 not required to, in effect, involuntarily finance plaintiff's
25 business by deferring collection of taxes which were due.

26 /////

1 Next, plaintiff argues that the appeals officer abused his
2 discretion by failing to take into consideration its alternate
3 proposal to pay its back taxes. The appeals officer is required
4 to consider collection alternatives, which may include the posting
5 of a bond, the substitution of other assets, or an installment
6 agreement. See 26 U.S.C. § 6330(c)(2)(A)(iii). As stated, the
7 appeals officer did consider plaintiff's initial proposal. When
8 plaintiff failed to secure a letter of credit it proposed to make
9 its tax payments based on an "expected" grant from the Farm Service
10 Agency and "anticipate[d]" loans from the federal government. See
11 Decl. Norma Schrock, at Exh. 14. The appeals officer found that
12 such a proposal lacked substance. The appeals officer concluded
13 that the IRS could not accept its alternate proposal given
14 plaintiff's long history of tax delinquency, its proposed payment
15 plan's lack of specificity, and its inability to provide the
16 requested security through a collateral agreement or bond. AJP
17 Management v. United States, 2000 WL 33122693 (C.D. Cal. 2000);
18 Kitchen Cabinets v. United States, 2001 WL 237384 (N.D. Tex. 2001).
19 Under the circumstances, that determination was within the appeals
20 officer's discretion.

21 For the foregoing reasons, the court concludes that the
22 appeals officer's determination was not an abuse of discretion.

23 ////

24 ////

25 ////

26 ////

Accordingly, the court GRANTS defendant's motion for summary judgment² and the Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: December 18, 2001.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

² At oral argument, plaintiff's counsel asserted that the court should follow the decision in Mesa Oil, Inc. v. United States, 2000 WL 1745280 (D. Colo. 2000), and remand this matter to the appeals officer. In Mesa, the court found that the appeals officer's determination was inadequate because it had "no statement of facts, no legal analysis, and no explanation of how or why the proposed levy balanced the need for collection with Mesa's interests." Id., at *4. The court concluded that the appeals officer's "sparse determination" demonstrated that the "proposed collection action was approved solely because the IRS showed that it had followed appropriate procedures," and thus had to be remanded. Id. Here, the appeals officer's determination contains a detailed factual history, demonstrates a consideration of the appropriate issue, demonstrates application of the requisite balancing test and explicates why the lien was necessary. Mesa is clearly distinguishable from the matter at issue.

United States District Court
for the
Eastern District of California
December 20, 2001

* * CERTIFICATE OF SERVICE * *

2:01-cv-00158

McCarty Company

v.

USA

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 20, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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SJ/LKK

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Jack L. Wagner, Clerk

BY: M. Krueger
Deputy Clerk